No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF EMPLOYEES OF THE STATE OF MINNESOTA COURT SYSTEM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Harris v. Quinn,
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Int'l Ass'n of Machinists v. Street,
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U.S. Const., amend. XIV 2

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5 U.S.C. § 7113 15

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About NFFE: Who We Are, http://goo.gl/qRLxpM. . . .16

AFGE, *At A Glance*, https://goo.gl/9WUDPN 16

Andrew Buttaro, *Stalemate at the Supreme Court: Friedrichs v. California Teacher's Association, Public Unions, and Free Speech*, 20 Tex. Rev. L. & Pol. 341 (2016) 16

Bureau of Labor Statistics, *Union Members Summary*, U.S. Dep't of Labor (Jan. 26, 2017) 17

Charles W. Baird, *Toward Equality and Justice in Labor Markets*, 20 J. Soc. Pol'y & Econ. Stud. 163 (1995) 9

Chris Edwards, *Public Sector Unions and Rising Costs of Employee Compensation*, 30 Cato J. 87 (2010).....16

Heather Weiner, *Illinois Unions Wrote the Laws they Blame in 'Fair Share' Debate,"* Illinois Policy (Feb. 28, 2015) 9

John C. Moorhouse, *Compulsory Unionism and the Free-Rider Doctrine*, 2 Cato J. 619 (1982) . .18, 20

Cited Authorities

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Joseph D. Reid & Michael M. Kurth, *The Contribution of Exclusive Representation to Union Strength*, 5 J. Labor Research 4 (1984).....14

Matt Grossman, *Right to Work Effects Overblown*, Michigan Policy Wonk, Michigan State University Institute for Public Policy and Social Research (Mar. 15, 2016) 17

IDENTITY & INTEREST OF *AMICI CURIAE*[1]

Amici are Carrie Keller and Elizabeth Zeien, two employees of the Minnesota Court System in Dakota County, Minnesota. Ms. Keller has served as a Judicial Court Administrative Assistant since 2014, and Ms. Zeien has worked as an Accounting Technician since September 2016. Until recently, they each represented themselves in negotiating the terms and conditions of their employment. But on March 6, 2017, Teamsters Local 320 and the Minnesota Court System reached a settlement regarding the Teamsters' petition for bargaining-unit clarification. As part of the settlement agreement, the Minnesota Court System assigned *Amici* to bargaining units. Pursuant to the collective-bargaining agreement that Teamsters have with the Minnesota Court System, *Amici* are now required to pay agency fees to the union as a condition of their employment.

Were it not for the compulsory nature of the agency fees, *Amici* would not subsidize the activities of Teamsters Local 320. Minnesota's Public Employment Labor Relations Act ("PELRA"), however, allows the union to force *Amici* to support its activities. *See* Minn. Stat. § 179A.06(3) (authorizing unions serving as "exclusive representative[s]" to require that non-member employees pay a "fair share" fee for services rendered by the union).

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1. Pursuant to this Court's Rule 37.6, counsel for *Amici Curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *Amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

In June 2017, *Amici* filed suit in federal district court alleging that PELRA compels political speech and association in violation of their First and Fourteenth Amendment rights. *See Keller v. Shorba*, No. 17-cv-01965 (D. Minn.). When Janus's petition for certiorari was granted, *Amici*'s litigation was stayed pending the decision in this case.

The Court's decision in this case is likely to directly control the outcome of *Amici*'s case. The Illinois Public Labor Relations Act ("IPLRA") provision challenged by Janus is substantially similar to PELRA's compulsory-fee provision—both statutes require non-member employees to pay agency fees to public-sector unions in violation of the employees' First and Fourteenth Amendment rights. And like Janus, *Amici* are being forced to subsidize the speech of an organization they do not support. *Amici* thus urge the Court to protect Janus's and *Amici*'s First Amendment rights by ruling in Janus's favor and finding IPLRA's compulsory-fee provision unconstitutional.

SUMMARY OF ARGUMENT

Compulsory agency fees force public employees to engage in political speech they disagree with and to associate with political associations they oppose in violation of their First Amendment rights. This is true regardless of whether those fees fund a union's advocacy and lobbying activities or its negotiation efforts with government employers. Both types of activities are inherently political.

The attempt in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), to draw a distinction between the two

in the context of public-sector unions has been properly recognized as erroneous and unworkable. *See Harris v. Quinn*, 134 S. Ct. 2618, 2632-33 (2014); *Knox v. Serv. Emp. Int'l Union, Local 1000*, 567 U.S. 298, 310 (2012). "Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, the compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Knox*, 567 U.S. at 310-11 (quoting *Ellis v. Bhd. of Ry.*, 466 U.S. 435, 455 (1984)). *Abood* failed to evaluate union-shop arrangements under heightened constitutional scrutiny and therefore must be reconsidered.

IPLRA's compulsory-fee provision cannot survive heightened scrutiny because it is not narrowly tailored, nor does it "serve a 'compelling state interes[t] ... that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 567 U.S. at 310). Even if promoting labor peace through the designation of an exclusive representative were a compelling state interest, union-shop arrangements like those dictated by IPLRA and PELRA are not sufficiently tailored to that interest.

Amici write separately to refute two justifications for compulsory-fee provisions that Respondents are likely to raise: (1) that compulsory fees are necessary to persuade public unions to act as an exclusive representative; and (2) that compulsory fees are necessary to prevent free-riding by non-members. Neither is true nor even comes close to justifying the First Amendment burdens imposed by compulsory-fee provisions.

First, compulsory fees are not tied to the existence of an exclusive representative, because unions are incentivized to take on this role for their own benefit regardless of whether they receive monetary compensation from non-member employees. Exclusive representation is not a burden for unions, but a privilege. It authorizes the union to speak on behalf of *all* unit employees, regardless of whether they are union members, and requires that employees and their employers include union representatives in key communications and disputes. In addition, public employers are required to negotiate with exclusive representatives, devise a collective-bargaining structure, and include the representatives in key decisions. Exclusive representation also assists unions in recruiting members, retaining members, and collecting dues. Unions thus need not be cajoled into accepting these benefits—they will wear the crown of exclusive representative regardless of whether they are paid by non-member employees to do so.

Second, the rationale that compulsory fees are necessary to prevent free-riding by non-members is likewise flawed. There is no evidentiary basis for the claim that unions are prohibitively burdened by free-riding non-member employees who file grievances through the union. In fact, the total control unions wield in regard to the grievance-adjustment process is yet another privilege of exclusive representation. And any negligible costs borne by the union from processing non-member's grievances are outweighed by these benefits.

ARGUMENT

I. This Court Should Reconsider *Abood*, Because It Failed to Evaluate Union-Shop Arrangements under the Heightened Constitutional Scrutiny Required by This Court's First Amendment Precedents.

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court considered the constitutionality of public-sector union-shop arrangements. It found that such statutory provisions served the "important" government interest of promoting "labor peace" through the "designation of a single representative." *Id.* at 220, 224-25. It then concluded that compulsory-fee provisions were justified because they helped "distribute fairly the cost of [exclusive representation] among those who benefit," and served to "counteract[] the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 222 (quoting *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 761 (1961)). In reaching this conclusion, the opinion did not discuss constitutional scrutiny and it applied a notably lenient standard.

This Court has since recognized the "troubling" flaws in *Abood*'s analysis, calling the decision "questionable on several grounds." *Harris v. Quinn*, 134 S. Ct. 2618, 2632 (2014). It has noted that the opinion's dual rationales for upholding union-shop arrangements are "generally insufficient to overcome First Amendment objections," referring to the decision as "something of an anomaly." *Id.* at 2627 (quoting *Knox v. Serv. Emp. Int'l Union, Local*

1000, 567 U.S. 298, 311 (2012)). Specifically, this Court has since clarified that compulsory-fee provisions impose "a significant impingement on First Amendment rights" by compelling political speech and association and therefore "cannot be tolerated unless [they] pass[] 'exacting First Amendment scrutiny.'" *Id.* at 2639 (quoting *Knox*, 567 U.S. at 310).

At a minimum, this "exacting" scrutiny invokes the heightened standard articulated in *Knox*, under which the provision must "serve a 'compelling state interes[t] that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox*, 567 U.S. at 310 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (alteration omitted)). This Court has long applied that standard, or similar variations, in cases involving compelled expressive association. *See, e.g.*, *Roberts*, 468 U.S. at 623 (collecting cases).

However, this Court has suggested that level of scrutiny may be "too permissive" for a case like this that involves not only compelled expressive association, but also compelled political speech. *Harris*, 134 S. Ct. at 2639. *Amici* agree and therefore join Janus in urging the Court to apply strict scrutiny to this case. *See* Pet. Br. at 20-21. This Court subjects compelled speech to strict scrutiny to ensure that the "government [does] not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Riley v. Nat'l Fed. of the Blind of North Carolina, Inc.*, 487 U.S. 781, 800 (1988). Laws regulating expenditures for political speech—like the compulsory fees at issue here—are also subject to strict scrutiny, which means the restriction must "'further[] a compelling state interest and [be] narrowly tailored to

achieve that interest.'" *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (quoting *FEC v. Wis. Right to Life*, 551 U.S. 449, 464 (2007)).

In light of this Court's First Amendment jurisprudence and intervening decisions regarding union-shop arrangements, *Abood* can no longer stand and should be reconsidered. This Court should disregard that opinion's flawed analysis and apply the requisite heightened level of scrutiny to compulsory-fee provisions. Given IPLRA's regulation of expenditures for political speech, strict scrutiny is the proper standard for this case. At a minimum, this Court should apply the exacting-scrutiny standard employed in *Knox*, *Harris*, and other compelled-association cases.

II. IPLRA's Compulsory-Fee Provision Cannot Survive Heightened First Amendment Scrutiny.

Whether this Court applies traditional strict scrutiny or the exacting First Amendment scrutiny articulated by *Knox* and *Harris*, IPLRA's compulsory-fee provision fails. *Abood* concluded that union-shop arrangements are necessary to incentivize unions to bear the burdens of being exclusive representatives, and to prevent the free-riding that would otherwise result. 431 U.S. at 221-22. But these purported rationales for compelling political speech and association do not "serve a 'compelling state interes[t]" and any interests they do serve can "be achieved through means significantly less restrictive of associational freedoms.'" *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289).

The *Abood* Court found that the government has an "important" interest in promoting labor peace through the designation of a single representative. 431 U.S. at 225. It explained that exclusive representation "avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment," "prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization," "frees the employer from the possibility of facing conflicting demands from different unions," and "permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." *Id.* at 220-21.

Amici contest the notion that this governmental interest could be considered compelling enough to justify depriving public employees of their First Amendment freedoms. But even if it were, IPLRA's compulsory-fee provision is not sufficiently tailored to that interest because union-shop arrangements are not "tied to the union's status as exclusive bargaining agents." *Harris*, 134 S. Ct. at 2640. Unions will pursue the coveted role of exclusive representative regardless of whether they are compensated through compulsory fees, because that position of power benefits unions and helps them to thrive. Relatedly, any negligible costs arising from alleged free-riding by non-members in the grievance-adjustment process is outweighed by the significant benefits unions reap from wielding total control over that process.

A. Public Unions Will Act as Exclusive Representatives Without Compulsory Fees.

It is not a burden but a privilege for unions to hold the coveted role of exclusive representative, and unions need not be compensated for receiving privileges from the state. The degree of influence awarded to whoever fills this role is precisely what drives unions to voluntarily seek these coveted positions. In fact, unions have historically advocated for statutory provisions requiring exclusive representation, precisely because these roles are such a boon for them.[2] Thus, it "is disingenuous for unions to claim that exclusive representation is a burdensome requirement." Charles W. Baird, *Toward Equality and Justice in Labor Markets*, 20 J. Soc. Pol'y & Econ. Stud. 163, 179 (1995).

1. Exclusive Representatives Enjoy Numerous Powers and Privileges.

Contrary to Respondent's suggestions, unions obtain numerous advantages when they act as an exclusive representative. *First*, exclusive representation amplifies

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2. Unions have supported, lobbied for, and even authored provisions which grant exclusive representation. In Illinois, the AFL-CIO assisted in authoring the IPLRA, and the Illinois Education Association and Illinois Federation of Teachers assisted in authoring the Illinois Educational Labor Relations Act, which contains similar exclusive-representation provisions. *See* Heather Weiner, *Illinois Unions Wrote the Laws they Blame in 'Fair Share' Debate*," Illinois Policy (Feb. 28, 2015), https://goo.gl/fFERW8 ("A look back to the legislative history of the two acts reveals that unions did not get saddled with legal obligations to represent nonmembers against their will. Rather, they created these legal obligations at the same time they created the mechanism with which to compensate themselves for those obligations.").

union speech. As the sole employee representative, a union is authorized to speak on behalf of *all* employees, regardless of whether those employees are members of the union. Therefore, when a union is designated exclusive representative, its speech is transformed from that of a subgroup, offering one viewpoint among many, into the *only* employee voice an employer need listen to. In fact, individual employee speech is often expressly limited by statute so that individuals are prohibited from sending mixed messages. For example, under Illinois law, an employee may not bargain for aims that are "inconsistent with the terms of any agreement in effect between the employer and the exclusive bargaining representative." 5 Ill. Comp. Stat. 315/6(b). Similarly, under Minnesota law, "[i]f an exclusive representative has been certified for an appropriate unit, the employer shall not meet and negotiate or meet and confer with any employee or group of employees who are in that unit except through the exclusive representative." Minn. Stat. § 179A.07.

Exclusive representation also mandates that the union be included in all relevant employer-employee communications. *See, e.g.*, 5 Ill. Comp. Stat. 315/6(b) (employees who wish to present a grievance directly to their employer "without the intervention of an employee organization" can do so only if "the exclusive bargaining representative is afforded the opportunity to be present at such conference"); Minn. Stat. § 179A.06, Subd. 1 (employees who wish to "express or communicate a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment" may do so only in a way that "does not ... circumvent

the rights of the exclusive representative").[3] The power wielded by exclusive representatives in this regard is so great that this Court has imposed fiduciary duties on unions, comparing their relationship with the employees they represent to that of attorneys and their clients. *See ALPA v. O'Neill*, 499 U.S. 65, 74-75 (1991).

Second, exclusive representation benefits unions because public employers are *required* by statute to meet the union representative at the bargaining table. *See, e.g.*, 5 Ill. Comp. Stat. 315/4 (2017) ("Employers ... shall be required to bargain collectively ... upon request by employee representatives."); Minn. Stat. § 179A.07, Subd. 2(a) ("[A] public employer has an obligation to meet and negotiate in good faith with the exclusive representative of public employees in an appropriate unit regarding grievance procedures and the terms and conditions of employment.").[4] Few, if any, other advocacy groups

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3. These provisions are not unique to Illinois and Minnesota. Rather, this power is a standard aspect of exclusive-representation arrangements. *See, e.g.*, N.M. Stat. Ann. § 10-7E-15 ("The exclusive representative shall act for all public employees in the appropriate bargaining unit and negotiate a collective bargaining agreement covering all public employees in the appropriate bargaining unit."); Ohio Rev. Code Ann. § 4117.04 ("The board or any party shall address to the appropriate designated representative all communications concerned with collective relationships.").

4. These provisions are likewise nearly universal. *See, e.g.*, N.H. Rev. Stat. § 273-A:3 ("It is the obligation of the public employer and ... the exclusive representative of the bargaining unit to negotiate in good faith."); Mich. Comp. Laws § 423.215 ("A public employer shall bargain collectively with the representatives of its employees ... ."); Ohio Rev. Code Ann. § 4117.04 (West 2017) ("Public employers shall extend to an exclusive representative

enjoy this same right of access to the government to present demands on behalf of those they represent. Such unmatched privilege, standing alone, is reason enough for unions to take up the mantle of exclusive representative in order to further their agendas directly with the powers that be.

Third, rather than depleting membership and encouraging free-riding, exclusive representation actually facilitates unions' recruiting and retention efforts. Employees are far more likely to join a union and remain a member when they lack the right to negotiate and speak on their own behalf or if they are required to include the union in their negotiations. *See, e.g., Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984) (acknowledging that in an exclusive representation scheme, employees "may well feel some pressure to join the exclusive representative in order to ... give them a voice[.]"); *NLRB v. Allis-Chalmers*, 388 U.S. 175, 180 (1967). When employees are reliant on the union to resolve a substantial range of employment issues in their favor, employees have a stronger incentive to join so they can select leadership and influence the group that will inevitably represent them.

... the right to unchallenged and exclusive representation[.]"); 43 Pa. Cons. Stat. § 1101.702 ("Public employers ... shall be required to meet and discuss on policy matters ... upon request by public employee representatives."); *see also* 43 Pa. Cons. Stat. § 1101.701 (imposing a "mutual obligation" on the exclusive representative and public employer to engage in bargaining); 19 Del. Code Ann. tit. 19, § 1304 (obligating the public employer to bargain with the exclusive representative and forbidding the public employer from bargaining with any other "employee, group of employees, or employee organization").

Moreover, exclusive representatives have access to employee information and facilities, both of which assist the union in recruiting and retaining members. Under Illinois law, "[a] public employer is required upon request to furnish the exclusive bargaining representative with a complete list of the names and addresses of the public employees in the bargaining unit." 5 Ill. Comp. Stat. 315/6(c). Similarly, Minnesota requires employers to "provide the exclusive representative with a list of all unit employees." Minn. Stat. § 179A.06, Subd. 3. In addition to providing employee information, other states give the exclusive representative access to employment facilities, which enables the union to easily communicate with, and thus recruit, unit employees. *See, e.g.*, Cal. Gov't Code § 3543.1(b).[5]

Fourth, exclusive representation facilitates the union's collection of dues. Most exclusive representatives enjoy the right to directly deduct dues and fees from employee paychecks through "dues checkoff" provisions. Illinois provides, for example, that "[o]nly the exclusive representative may negotiate provisions in a collective bargaining agreement providing for the payroll deduction of labor organization dues, fair share payment, initiation

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5. These provisions have been upheld against constitutional challenges, even when competing unions are denied the same rights of access. *See Perry Edu. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 39-40 (1983) (upholding exclusive access to teacher mailboxes and inter-office mail system by representative union); *see also Connecticut State Fed'n of Teachers v. Bd. of Edu. Members*, 538 F.2d 471, 477-78 (2d Cir. 1976); *Memphis Am. Fed'n of Teachers Local 2032 v. Bd. of Edu.*, 534 F.2d 699, 703 (6th Cir. 1976); *Clark Cty. Classroom Teachers Ass'n v. Clark Cty. Sch. Dist.*, 532 P.2d 1032 (Nev. 1975) (per curiam).

fees and assessments." 5 Ill. Comp. Stat. 315/6. In Minnesota, "[p]ublic employees have the right to request and be allowed dues checkoff for the exclusive representative." Minn. Stat.§ 179A.06, Subd. 6. Many other states similarly authorize such automatic deductions. *See, e.g.*, 19 Del. Code Ann. tit. 19, § 1304(c); 43 P.A. Stat. § 1101.705; N.M. Stat. Ann., § 10-7E-26.

Under this system, employees opt-in to automatic deductions from their paychecks (or are opted-in by force of the agency-fee arrangement) rather than submit a periodic payment on their own. These deductions continue until the employee takes affirmative steps to revoke them. *See, e.g.*, 5 Ill. Comp. Stat. 315/6. In fact, employees are often provided only a limited window during which even voluntary payroll deductions can be stopped. *See, e.g.*, *Newspaper Guilt/CWA v. Hearst Corp.*, 645 F.3d 527, 528-29 (2d Cir. 2011) (addressing a checkoff provision that allotted employees one 15-day window per year in which to stop automatic payroll deductions); *Williams v. NLRB*, 105 F.3d 787, 792 (2d. Cir. 1996) (holding employee must act within a 10-day revocation window, even if he has resigned from union membership); *NLRB v. U.S. Postal Serv.*, 833 F.2d 1195, 1197 (6th Cir. 1987) (same). Collecting fees would be substantially more difficult without these provisions. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009); *FEC v. NEA*, 457 F. Supp. 1102, 1109 (D.D.C. 1978). Moreover, the power to automatically collect dues without having to solicit members directly for their payment generally increases unions' retention rates, even when dues and fees are not mandatory. *See* Joseph D. Reid & Michael M. Kurth, *The Contribution of Exclusive Representation to Union Strength*, 5 J. Labor Research 4, pp. 394-97 (1984).

2. Because Exclusive Representative is a Coveted Position of Great Privilege, Public Unions Will Embrace the Role Without Forced Compensation.

In *Harris*, this Court noted that "a critical pillar of the *Abood* Court's analysis rests upon an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop." 134 S. Ct. at 2634. That assumption is specious and empirical evidence proves as much. Indeed, the fact that the federal government and numerous "right to work" states have successfully maintained exclusive-representation arrangements without compulsory fees refutes the notion that the two are inextricably linked.

The federal government has a typical exclusive-representation arrangement. *See* 5 U.S.C. § 7102 *et seq.* A union that is designated as an exclusive representative is entitled to national consultation rights, the right to review and comment on decisions regarding conditions of employment, and the authorization to speak on behalf of all federal employees within their bargaining units. 5 U.S.C. §§ 7111, 7113, 7114. Several large unions successfully represent federal workers pursuant to this arrangement without the law requiring federal employees to pay agency fees. The National Federation of Federal Employees ("NFFE") is an AFL-CIO network of over 200 local unions, representing approximately 110,000 public employees in federal government agencies such as the Department of Defense, the Army Corps of Engineers, the General Services Administration, Department of Veterans Affairs, State Department, and other branches of the

federal government. NFFE, *About NFFE: Who We Are*, http://goo.gl/qRLxpM. Similarly, the American Federation of Government Employees ("AFGE") represents 700,000 employees in the federal government and the District of Columbia through a federation of collective-bargaining units. AFGE, *At A Glance*, https://goo.gl/9WUDPN. Nearly one-half of its members pay dues. *Id.* Despite the fact that nearly fifty percent of its members are "free riding," the union ably and successfully carries out its role as exclusive representative. *See* Andrew Buttaro, *Stalemate at the Supreme Court: Friedrichs v. California Teacher's Association, Public Unions, and Free Speech*, 20 Tex. Rev. L. & Pol. 341, 375 (2016).

Several "right to work" states also maintain exclusive representation without compulsory fees, including Nevada, Iowa, Florida, Nebraska, and Michigan. Generally, in states without compulsory-fee provisions, public-sector union membership remains steady at approximately 68%. *Id.* at 385. And among the states that affirmatively ban compulsory fees, union membership is uniformly higher in states that have exclusive representation compared to those that do not. Chris Edwards, *Public Sector Unions and Rising Costs of Employee Compensation*, 30 Cato J. 87, 96-99 (2010). These figures suggest that the primary benefit to unions comes from exclusive-representation provisions, not from agency fees, further reinforcing the conclusion that the former is not tied to the latter.

Recent changes in Michigan labor laws provide an additional example of how exclusive representation can flourish without compulsory fees. The Michigan Public Employment Relations Act ("PERA") authorizes exclusive representation in the public sector. Mich. Comp. Laws

§§ 423.26, 432.201(1)(a). On March 28, 2013, compulsory fees were banned. *Id.* at § 423.14(1)(c). Nevertheless, 15.5% of Michigan workers reported union membership in 2016. While this figure is down slightly from a 2015 average of 16.5%, it nonetheless continues to outpace the national average of 10.7% for 2016 and 11.1% for 2015.[6] All in all, this change in the law had little effect. *See* Matt Grossman, *Right to Work Effects Overblown*, Michigan Policy Wonk, Michigan State University Institute for Public Policy and Social Research (Mar. 15, 2016), http://goo.gl/GbGQL7. Unions continue to thrive in Michigan, demonstrating that exclusive representation is not dependent on compulsory-fee provisions.

The powers and privileges that come with being the sole intermediary for negotiating rights and benefits between employees and their employer are immense. *See Steele v. Louisville & Nashville Ry.*, 323 U.S. 192, 202 (1944) (comparing an exclusive representative to a legislative body that can "create and restrict the rights of those whom it represents"). Thus, the title of exclusive representative is its own reward. *See Sweeney v. Pence*, 767 F.3d 654, 666 (7th Cir. 2014) (concluding that the union was "fully and adequately compensated by its rights as the sole and exclusive member at the negotiating table"). Additional compensation in the form of compulsory fees is unwarranted and, as the evidence shows, unnecessary to persuade public-sector unions to embrace this highly sought-after role.

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6. *See* Bureau of Labor Statistics, *Union Members Summary*, U.S. Dep't of Labor (Jan. 26, 2017), http://goo.gl/zxlWqV.

B. Total Control Over Grievance Adjustment Is an Additional Benefit that Vastly Outweighs the Negligible Costs of Processing Free-Rider's Grievances.

In *Abood*, the Court asserted that "representing the interests of employees in settling disputes and processing grievances" is costly, time-consuming, and vulnerable to "free-riders" who would reap the benefits of union representation without contributing to the costs. 431 U.S. at 221-22. But realistically the costs incurred from genuine free-riding are de minimis. And total control over grievance adjustment is one of the many advantages that make the role of exclusive representative so desirable. Unions seek the opportunity to control non-member grievances, in addition to those of their members, because doing so benefits them. Unions are thus not entitled to compensation for their opportunistic role in this process.

To start, *Abood*'s conceptualization of free-riding in the grievance context is overly broad. Grievances in which a union chooses to assert itself on behalf of an employee cannot be considered a "free ride" by the unwitting employee. *See* John C. Moorhouse, *Compulsory Unionism and the Free-Rider Doctrine*, 2 Cato J. 619, 628 (1982). Even when employees seek out union representation, the unions have wide discretion to pursue claims as they see fit and are not required "to process grievances of employees that are unmeritorious." 5 Ill. Comp. Stat. 315/6(d); *see Neal v. Newspaper Holdings, Inc.*, 349 F.3d 363, 369 (7th Cir. 2003). In sum, true free-riding exists only when meritorious grievance claims are brought by non-member employees demanding union assistance *and* the union would have not participated but for its duties

as exclusive representative. But this category of cases is exceedingly narrow because it is in the union's interest to participate in all cases. The more control unions exercise over the grievance-adjustment process, the more the unions benefit.

In Illinois, unions wield significant authority over grievance adjustments. The exclusive representative essentially controls every major aspect of the process: they negotiate the overarching terms of procedure for resolving grievances, 5 Ill. Comp. Stat. 315/8; they process the grievances themselves;[7] and if an employee seeks to represent himself in the grievance process, the exclusive representatives are nevertheless entitled to a place at the bargaining table, and "any settlement made [can] not be inconsistent with the terms of any agreement in effect between the employer and the exclusive bargaining representative." 5 Ill. Comp. Stat. 315/6.

This degree of control reaps many benefits. Primarily, it allows unions to operate with a singular focus when seeking to influence policy through grievance adjustment. *See Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 69-70 (1975) (noting that a union "has a legitimate interest in presenting a united front ... and in not seeing its strength dissipated"). By doing so, a union increases its ability to achieve its policy goals while avoiding the creation of unfavorable policy. For example, if an employee's grievance process results in the recognition

7. In Minnesota, exclusive representatives for court employees like *amici* "are also responsible for administering grievances arising under previous contracts covering employees included within the unit which remain unresolved." Minn. Stat. § 179A.102.

that the employee is entitled to a particular benefit, other similarly situated employees will feel the precedential effect of that outcome. If the union desired that outcome, it has effectively achieved its policy goal. However, if that outcome was one the union did not agree with, the union members would nevertheless be bound by its precedential effect. By controlling *all* grievance adjustments, the union can steer them away from outcomes they don't want towards those they do.

Unions can also use the grievance process as an enforcement mechanism to keep employees "in line" and as a tool to encourage membership and support of the union. The union has wide discretion in deciding which grievances to pursue and which to deem unmeritorious. This allows the union "to discriminate among employees and to discipline those out of favor with the union leadership." Moorhouse, 2 Cato J. 2 at 623. Under this regime, employees are incentivized to stay in their union's good graces.

In light of these benefits, unions have every reason to voluntarily participate in the vast majority of meritorious grievance claims. Therefore, the number of cases involving genuine free-riding is likely very low, if not zero, which means the costs unions incur from them are negligible—especially in light of the substantial benefits that flow from having total control over grievance adjustments. Even if one were to consider all grievance-adjustment costs and not just those from free-riders, the amount spent on grievance procedures may not be as high as unions represent. For instance, AFSCME Council 31 ("Council 31") spent $43,610,088 in 2016 according to its annual LM-2 report filed with the Department of Labor. *See* U.S.

Dep't of Labor, Union Search, https://goo.gl/Kdmqbm. Of that total, $9,462,484 was spent on "Representational Activities," which include grievance procedures, among other activities related to collective bargaining and the enforcement of agreements. *Id.* There is a separate category for reporting "Political Activities and Lobbying" expenditures. In its 2016 filing, Council 31 included in "Representational Activities" items such as a payment for a poll about Illinois Governor Bruce Rauner who they opposed, printing fees for "Support State Workers Signs," a payment for "Stop Rauner" advertisements, and charter buses for a May 18, 2016 rally in Springfield to protest Governor Rauner. *Id.* Perhaps Council 31 is an outlier, but its report undermines any claim that grievance proceedings are eating up union resources.

* * *

The role of exclusive representative is not a burden for unions. It is a coveted privilege that effectively provides unions a monopoly on bargaining power that assists them in furthering their policy goals and recruiting and retaining members. Because of these benefits, unions voluntarily seek out these roles regardless of whether they receive additional monetary compensation from non-member employees via compulsory fees. Likewise, unions elect to process non-member grievances in order to reap the many benefits of having total control over grievance adjustments.

These realities refute *Abood*'s flawed assumptions regarding free-riders and the necessity of compulsory fees. Compulsory fees are not tied to exclusive representation, let alone narrowly tailored to them. Because exclusive

representation can and does flourish without these severe restrictions on public servants' expressive and associational freedoms, ILPRA's compulsory-fee provision does not survive constitutional scrutiny.

CONCLUSION

For all these reasons, this Court should reverse the Seventh Circuit's decision.

Respectfully submitted,

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